ORIGINAL

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

STEPHEN B. JONES, et al,	§	
	§	
Plaintiffs,	§	
	§	
	§	**CIVIL ACTION NO.**
GOVERNOR GEORGE W. BUSH	§	**3:00-CV-2543-D**
in his capacity as Candidate for	§	
President, et al,	§	
	§	
Defendants.	§	

PLAINTIFFS' RESPONSE TO DEFENDANTS'
MOTION TO DISMISS, AND SUPPORTING BRIEF

TO THE HONORABLE UNITED STATES DISTRICT JUDGE:

COMES NOW, plaintiffs Stephen B. Jones, Linda D. Lydia and Caroline Franco, who make and file this response to defendants Bush and Cheney's motion to dismiss, as well as to the defendant Electors' motion to dismiss, and in support thereof would respectfully show the Court as follows:

1. Background

Defendants Bush and Cheney have moved to dismiss this action on three grounds: (1) the plaintiffs' alleged lack of standing; (2) the action allegedly involves a nonjusticiable "political question;" and (3) failure to state a claim for which relief can be granted.

The defendant Electors also move to dismiss on three grounds: (1) the plaintiffs' alleged lack of standing; (2) the action allegedly involves a nonjusticiable "political question;" and (3) failure to serve the electors. Each contention lacks merit, and will be addressed in turn.

2. The Plaintiffs Have Standing to Bring this Action

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A. The Three-part Test for Standing

At an "irreducible constitutional minimum," a plaintiff must establish three elements to have standing. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). First, the plaintiff must show that it has suffered "an injury in fact-a harm suffered by the plaintiff that is concrete and actual or imminent, not conjectural or hypothetical." *Id.* Second, the plaintiff must establish "causation-a fairly traceable connection between the plaintiff's injury and the complained-of conduct of the defendant." *Id.* Lastly, "there must be redressability-a likelihood that the requested relief will redress the alleged injury." *Id.* at 561.

This suit seeks injunctive relief against the thirty two individuals who have been elected to represent the State of Texas as Presidential Electors for the year 2000. Electors are appointed by the states. U.S. Const., Article II, section 1, clause 3; *see also Anderson v. Celebrezze*, 460 U.S. 780 (1983). "The sole function of the presidential electors is to cast, certify and transmit the *vote of the State* for President and Vice President of the nation." In re Green, 134 U.S. 377, 379 (1890) (emphasis added). They are not officers or agents of the United States. *Id.*

Thus, it is clear from the foregoing that the conduct of presidential electors in voting for President and Vice President constitutes state action, as the electors are elected officials of the State just like the Governor. It is also clear that the electors, in casting the State's vote, are speaking "on behalf of the voters they represent." *Anderson v. Celebrezze*, 460 U.S. at 815 (J. Rehnquist, dissenting), *citing Burroughs v. United States*, 290 U.S. 534, 545 (1934).

B. The Plaintiffs are Threatened with Imminent Injury by a Constitutional Violation

All citizens have standing to challenge the constitutionality of state action when they are threatened with injury as a result of that action. *Laird v. Tatum,* 408 U.S. 1, 13 (1972); *Babbitt v. United Farm Workers National Union,* 442 U.S. 289, 298 (1979).

The threatened injury in this case is that defendant Electors will cast their votes for President and Vice President – votes that they are casting on behalf of the plaintiffs, who are voters represented by the Electors – in a manner that is in violation of the proscriptions contained within the Twelfth Amendment to the Constitution of the United States. The Twelfth Amendment states:

> The Electors shall meet in their respective states, and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves....

Plantiffs allege that defendants Bush and Cheney are both inhabitants of the State of Texas, the same state as each of the Electors. Plaintiffs further allege that the Electors are bound by party pledge to vote for both Bush and Cheney, thus making the likelihood of a constitutional violation both probable and imminent.

It has long been held that voters have standing to challenge the constitutionality of state actions that directly impact the candidates for public office. *See Anderson v. Celebrezze*, 460 U.S. at 786; *Bullock v. Carter*, 405 U.S. 134, 143 (1972); *see also Henderson v. Ft. Worth Independent School District*, 526 F.2d 286 (5th Cir.1976), *cert. denied*, 441 U.S. 906 (1979). AS the Supreme Court said in *Bullock*:

> The rights of voters and the rights of candidates do not lend themselves to neat separation; laws that affect candidates always have at least some theoretical, correlative effect on voters.

Bullock v. Carter, 405 U.S. at 143.

The imminent violation of the Twelfth Amendment by the defendant Electors directly impacts the non-defendant candidates for President and Vice-President, because the votes of the defendant Electors are necessary for defendants Bush and Cheney to achieve a majority of the Electoral College and election to the offices of President and Vice-President. Enforcement of the

Twelfth Amendment, conversely, will prevent either Bush or Cheney, or both, from achieving the necessary majority of the Electoral College. The plaintiffs have standing to protect the interests of the non-defendant candidates for President and Vice-President.

Additionally, plaintiffs have alleged a direct "injury in fact" sufficient to show that they have a "personal stake" in the outcome of the legal action. *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 72 (1978). This direct injury as a result of the threatened violation of the Twelfth Amendment is analogous to the injury caused by the violation of a person's First Amendment rights to free speech. The First Amendment protects the right of a voter to cast a meaningful vote for the candidate of one's choice. *Dart v. Brown*, 717 F. 2d. 1491, 1504 (5th Cir. 1983) *cert denied* 469 U.S. 825 (1984). Under Texas law, the defendants Electors hold their office and their ability to vote for President and Vice-President solely by virtue of the votes cast by Texas voters for President and Vice-President. TEX. ELEC. CODE §§192.005, 192.035. The Electors, therefore, are casting votes that correspond with the votes cast by all Texas voters. The plaintiffs, as voters in the 2000 presidential election, have a direct personal stake in ensuring that the votes cast on their behalf by the defendant Electors are meaningful, (and thus, that their own popular votes were meaningful) and are not cast in violation of the United States Constitution.

Causation and redressibility should both be self-evident. Injunctive relief can prevent the defendant Electors from violating the Constitution and prevent the resulting harm to both the non-defendant candidates for President and Vice-President and the plaintiff voters.

3. The Eligibility of a Candidate is Not a Nonjusticiable Political Question

A. The Requirement of a "Textually Demonstrable Constitutional Commitment" is Strictly Construed

Defendants allege that the subject matter of this action is nonjusticiable under the Political Question Doctrine. Defendants Bush and Cheney ask this Courts to abstain from deciding the issue presented on the sole ground that there is a "textually demonstrable constitutional commitment of the issue to a coordinate political department." *Baker v. Carr,* 369 U.S. 186, 217 (1962). The defendant electors additionally allege a lack of judicially manageable standards for resolving the issues presented. *Id.* The defendants rely on Congress' authority to count electoral votes under the Twelfth Amendment, and its statutory authority to reject electoral votes "not regularly given." Neither provision supports defendants' contention that the eligibility of defendants Bush and Cheney to receive the votes of the defendant Texas Electors is a political question.

First, it is important to note that the defendants have attempted to misstate the plaintiffs' case. The essence of plaintiffs' case is *not,* as defendants allege, an attempt to prevent Congress from counting the votes of the defendant Texas Electors if they vote for Bush and Cheney. The essence of the plaintiffs' case is that Bush and Cheney are constitutionally ineligible to both receive the votes of the defendant Texas Electors because they both are inhabitants of Texas. It is the defendants' burden to show that the political question constitutionally committed to a coordinate political department is "inextricable from the case." *Baker v. Carr,* 369 U.S. at 217. The question of whether Congress can count the electoral votes is easily extracted from the case, as the plaintiffs have never injected it.

Secondly, defendants have failed to advise the Court of the strict manner in which they must show a "textually demonstrable constitutional commitment of the issue to a coordinate political department" before abstention under the Political Question Doctrine is appropriate. The Political Question Doctrine does not preclude judicial review of political cases where the

political conduct exceeds constitutional authority. *Baker v. Carr*, 369 U.S. at 217. A good example of this is found in a case cited by the defendants: *Powell v. McCormack*, 395 U.S. 486 (1969). In that case, the House of Representatives refused to seat the person elected, Adam Clayton Powell, because of alleged financial wrongdoing in the past. Mr. Powell sued the Speaker of the House for, among other things, back pay. The Speaker argued that the controversy was a political question, citing Article I, Section 5 of the Constitution, which provides that "Each House shall be the Judge of the ... Qualifications of its Own Members," and contending that the Constitution thus committed to House the broad right to determine whether Powell was qualified to serve. *Powell*, 395 U.S. at 518-20.

The Supreme Court disagreed. It held that the *scope* of the constitutional commitment to the House to judge its own Members must also be demonstrable from the text of the Constitution itself. *Powell*, 395 U.S. at 520; *see also Michel v. Anderson*, 14 F. 3d 623, 626 (D.C. Cir. 1993). It concluded that the Speaker had failed to show that the legislative history of Article 1, Section 5 granted Congress the broad discretion it sought, and that the Constitution limited the qualifications that could be judged by the House to the candidate's age, citizenship and residency, as those three Qualifications were the only relevant ones expressly contained in the text of Article I, Sections 2 and 3. *Powell*, 395 U.S. at 520-21. Significantly, the Court also rejected as irrelevant the Congress' own understanding of its power, as demonstrated by numerous precedents in the prior exclusion of members-elect for reasons other than their failure to meet Constitutional qualifications. *Powell*, 395 U.S. at 541-42, 546-47. It noted that prior Constitutional violations would not render the same action any less unconstitutional. *Powell*, 395 U.S. at 546-47.

A similarly narrow construction of the Constitution defeated the Speaker's second contention, also based on Article 1, Section 5, which permitted each House of Congress to "expel" a Member on a two-thirds vote. The Speaker noted that the vote against Powell was greater than two-thirds. *Powell*, 395 U.S. at 506-07. The Court held that Powell had been excluded, not expelled, and rejected arguments that Powell's exclusion prior to being administered the oath of office, rather than after, was an accident of timing. *Powell*, 395 U.S. at 507n.27.

A similarly narrow reading of the Twelfth Amendment's delegation of authority to Congress to "count" electoral votes does not also commit to Congress the authority to determine a candidate's eligibility to receive the electoral votes of a particular State. Even if there were a specific Constitutional provision delegating to Congress the authority to determine the qualifications of a candidate to be President or Vice-President – which there is not – under the reasoning in *Powell,* the Congress would be limited to ensuring that the President-elect met only those qualifications expressly set forth in the text of Article II, Section 1, *i.e.*, that the President-elect was a natural born citizen age 35 or more. There is certainly nothing in the Constitution which grants Congress authority to determine what electoral votes a candidate may receive.

Moreover, the law is clear that bodies other than Congress may regulate how a presidential elector may vote. The Supreme Court has upheld the authority of political parties to control the votes of presidential electors by written pledge. *Ray v. Blair*, 343 U.S. 214 (1952). The dispute over control of the electors' vote was, incidentally, clearly treated as a justiciable controversy.

The defendants' reliance on Congress' statutory authority to reject electoral votes "not regularly given" is also entirely misplaced. A political question requires a textually demonstrable ***constitutional*** commitment; a *statutory* commitment to Congressional authority is inadequate. *County of Oneida v. Oneida Indian Nation,* 470 U. S. 226, 249n.24 (1985).

B. The Electors Have Failed to Show a Lack of Judicially Manageable Standards for Resolving the Issues Presented.

The defendant Electors allege, without explanation or sufficient discussion of authority, that there are no judicially manageable standards for resolving the issues presented. *See Baker v. Carr,* 369 U.S. 186, 217 (1962). They contend that this suit would require the Court to supervise the electors' voting, as well as Congress' counting and certification of the electors' votes. The plaintiffs have requested and require nothing of the kind.

This is a simple case involving a request that the court interpret the word "inhabitant" as used in the Twelfth Amendment, and that the court make fact findings regarding the inhabitance of the defendants. Not only are the standards for these tasks judicially manageable, but they are extremely well-established over the entire history of the common law. Courts routinely interpret laws and constitutions and find facts.

The Electors' suggestion that this Court would have to supervise or monitor voting by the electors or the actions of Congress is ludicrous. This Court may adequately redress plaintiffs' complaints by granting only the declaratory and injunctive relief sought. A violation of the Court's injunction would become evident once the votes were unsealed by Congress and made a part of the public record. A violation of the Court's order would be punishable by contempt; no oversight of elections or Congress is required.

Moreover, the Electors ignore the fact that the Supreme Court of the United States has specifically upheld restrictions on an electors' discretion in voting which had been placed on the electors by a political party, and then enforced those restrictions by compulsory process. *Ray v. Blair,* 343 U.S. 214 (1952). Surely this Court can enforce a restriction on the electors' discretion in voting based on the express language of the Twelfth Amendment to the Constitution?

C. Texas Will Not be Disenfranchised

Finally, the defendant Electors engage in unwarranted hyperbole in declaring that an injunction would disenfranchise the State of Texas. The plaintiffs have not asked that the electors be prevented from voting; they ask only that the electors comply with the Constitutional requirement that at least one of the candidates they vote for not be an inhabitant of the State of Texas, as declared by this Court. The electors may vote for any alternative eligible candidate or abstain as they see fit.

No inextricable political question has been shown by the defendants.

4. Plaintiffs Have Stated a Claim for Which Relief Can be Granted

When considering a Motion to Dismiss for failure to state a claim, the Court must accept as true all well-pleaded allegations in the Complaint, and view them in the light most favorable to the plaintiffs. *See Malina v. Gonzales*, 994 F.2d 1121, 1125 (5th Cir. 1993). Such motions should be granted only when it appears without a doubt that the plaintiffs can prove no set of facts in support of their claims that would entitle them to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Tuchman v. DSC Communications Corp.*, 14 F.3d 1061, 1067 (5th Cir. 1994).

Rather than accepting the plaintiffs' allegations as true, the defendants are attempting to use their Rule 12(b)(6) motion as a vehicle for trying the case on the merits. They dispute plaintiffs' contention that defendant Cheney is an inhabitant of Texas under the Twelfth

Amendment, and that his change of voter registration was a sham. The defendants are, in essence, asking this Court to adjudge defendant Cheney's present and future intent without the benefit of evidence. The motion should be summarily rejected.

5. The Electors' Complaint Regarding Service of Process is Moot

Finally, six of the thirty two electors who have appeared in this case ask that the case be dismissed for the plaintiffs' alleged failure to obtain service of process. The contention is both moot and frivolous. Rule 4(m) specifically permits the plaintiffs up to 120 days to effect service of process. FED. R. CIV. P. 4(m). Dismissal is permitted after that period of time, not before.

Nevertheless, plaintiffs recognize that the emergency nature of this matter should require a shorter timeframe. Consequently, plaintiffs have already amended their complaint, and are already having service effected. This issue is therefore moot.

WHEREFORE, PREMISES CONSIDERED, plaintiffs pray that this Court deny defendants' motions to dismiss, and grant them such other and further relief to which they may be justly entitled.

Respectfully submitted,

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Certificate of Service

This is to certify that on this 29th day of November, 2000, a true and correct copy of the foregoing instrument was delivered to the following counsel of record by hand delivery or facsimile:

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